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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 469

PHILIPPINE AIR LINES, INC.,
Petitioner,
—against—
HOWARD ORLOVE, doing business under the firm name and style of H. ORLOVE COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF OPPOSING PETITION FOR CERTIORARI

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I. QUESTIONS PRESENTED

Two questions are presented by the petition herein: (1) Whether petitioner is liable to respondent under its *tariffs* for the loss of the latter's gold shipment from New York to Hong Kong and (2) Whether respondent is entitled to recovery against the petitioner under the *Rules of the Warsaw Convention* and if so, should respondent's recovery be limited to 250 francs per kilogram.

II. STATEMENT AND FACTS

Respondent Orlove sued petitioner Philippine Air Lines, Inc. and its connecting carrier, The Flying Tiger Line, to recover the sum of $24,150 representing the declared value of a shipment of gold choker necklaces delivered by Orlove to petitioner, as a common carrier, for carriage by air from New York to the Crown Colony of Hong Kong. Prior to trial, Orlove elected to proceed solely against petitioner and discontinued his action against Flying Tiger Line. Petitioner, in the meantime, cross claimed over against Flying Tiger for indemnification in case Orlove succeeded in obtaining judgment against it.

Pursuant to a uniform practice previously established, respondent on June 10, 1949, delivered to petitioner at New York a box containing 200 gold choker necklaces for carriage by petitioner as a common carrier by air from New York to Hong Kong. Prior thereto, however, Orlove had informed petitioner's clerk by telephone of the contents and value of the shipment for carriage, was instructed to deliver his package to a designated local trucker, (an agent of Flying Tiger Line which had an interline agreement with petitioner for the handling of all of petitioner's shipments originating or terminating within the United States), and to forward to petitioner two copies of a so-called "Shipper's Letter of Instructions" and other documents. Petitioner's clerk thereupon gave Orlove an airwaybill number which Orlove inserted on the Shipper's Letter of Instructions and the box. Following petitioner's instructions, Orlove thereupon delivered the box to the designated trucker and obtained a receipt therefor after which he forwarded to petitioner, by registered mail, two copies of the Shipper's Letter of Instructions, the shipper's invoice and a customs export declaration. Petitioner thereafter acknowledged receipt of respondent's shipment by issuing its airwaybill

bearing the number assigned by it to the shipment and containing the valuation previously given by Orlove. Respondent's shipment was lost or stolen *en route* to San Francisco while in the physical custody of The Flying Tiger Line. The trial court granted judgment in favor of respondent against petitioner and, in turn, in favor of petitioner against The Flying Tiger Line, for the full value of the shipment. The judgments were affirmed by the Court of Appeals for the Second Circuit whose opinion is reported in 257 F. 2d 384.

III. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

A. There Is No Conflict of Decisions Warranting A Review by this Court on Certiorari.

The issues in the present case are uniquely narrow and no amount of strained argument can convert them into questions warranting a review thereof by this Court on certiorari.

Petitioner urges as a basis for certiorari its claim that the Court of Appeals refused to apply the provisions of petitioner's tariffs to the instant case and, therefore, that the Court's action "is contrary to the established rules and in conflict with *its* prior decisions and decisions of this Court." Since petitioner has shown no conflict between the Court of Appeals' decision in this case and any decision of this Court, we shall limit our arguments to the alleged conflict between decisions of the Court of Appeals.

In support of its claim, petitioner asserts a conflict between the decision of the Court of Appeals in the instant case and the decision of the same Court in the case of *Lichten* v. *Eastern Air Lines*, 87 F.Supp. 691 aff'd 189 F.2d 939 (2 Cir., 1951). A comparison of the two decisions indicates not only a lack of conflict but an absence of similar issues.

The *Lichten* case involved a claim for loss of contents from baggage of a passenger who had purchased from a domestic air carrier passage between Miami and Philadelphia. The question before the Court there was the alleged unreasonableness of the carrier's *domestic* tariffs in exculpating the carrier from any liability for loss of jewelry from the passenger's baggage. The Court of Appeals held that the carrier's tariffs became part of the contract between the parties and that the reasonableness or unreasonableness of the carrier's tariffs could not be raised in the Courts until after exhaustion of administrative remedies. Plaintiff's attempt to set aside the carrier's tariffs was, therefore, denied.

It should be noted that there the Court was confronted with a problem dealing with the validity of a national carrier's domestic tariffs relating to loss of contents from baggage in *domestic* transportation, while here the issue before the Court concerned the liability of an international carrier for loss of cargo moving in *international* commerce under an airwaybill exclusively governed by the Rules of the Warsaw Convention.

The *Lichten* case was decided purely on issues raised by the carrier's domestic tariffs while in the instant case, the Court's decision rested on the liability of a foreign carrier under the Warsaw Convention, a treaty governing international shipments exclusively. Factually and legally the two decisions are compatible with each other and clearly distinguishable. It is clear that no conflict exists and accordingly there is no basis for certiorari.

B. The Courts Below Committed No Error.

Petitioner urges as its second reason for the granting of certiorari that "the Courts below erroneously failed to exonerate Philippine Air Lines" under the Rules of the Warsaw Convention; that the Convention (Article 20 (1))

precludes any recovery by Orlove because petitioner "took all necessary measures to avoid the damage or * * * it was impossible * * * to take such measures." Despite the language of the Convention requiring the *carrier* to prove its freedom from negligence, petitioner proved nothing except its tariffs and the interline agreement with Flying Tiger. It chose, instead, to rely on the admission by Flying Tiger that the loss was due to its negligence, overlooking completely the fact that under Article 1(3) of the Convention carriage performed by successive carriers is deemed to be one undivided carriage and that the carrier is liable, in the event of loss of goods, if the occurrence which caused the damage "took place during the transportation by air" (Article 18 (1)).

To support its claim of alleged error, petitioner cites but one case, *Fayre v. Belgian State and Sabena*, 1950 U. S. Av. Rep. 392, decided by the Court of Appeals of Belgium. We respectfully submit that the *Fayre* case is neither in point nor does it control, by analogy or otherwise, the case at bar. There, the question before the court was the possible liability of the air carrier *after* delivery of the shipment to the Belgian customs. Since the loss had taken place after the shipment had arrived at its destination, the court correctly held the carrier not liable. Here, respondent's shipment was *still in transit and still under the carrier's control.*

The fact that the loss occurred while the shipment was in the physical custody of The Flying Tiger Line did not relieve petitioner from liability for, as we have pointed out, under the Rules of the Convention quoted above, the movement constituted one undivided carriage and the loss took place "during the transportation by air". Moreover, the courts below correctly held petitioner liable for its *own* omissions and not those of The Flying Tiger Line (257 F. 2d at p. 387).

It is clearly apparent from the plea made herein that petitioner has either misunderstood or is unfamiliar with the legislative and self imposed limitations of this Court for the granting of certiorari. In this connection, we submit the observation of former Chief Justice Taft in *Magnum Co.* v. *Coty*, 262 U. S. 159, 163, is most appropriate:

> "The jurisdiction [of the Supreme Court to review cases by writ of certiorari] was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing. Our experience shows that eighty per cent. of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."

And, in an address before the American Bar Association on September 7, 1949, Chief Justice Vinson stated:

> "The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions. * * * The function of the Supreme Court is, therefore, to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws and treaties of the United States, and to exercise supervisory power over lower federal courts. * * * To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved * * *."

It is respectfully submitted, therefore, that certiorari for errors alleged to be committed below, does not lie and that sound judicial discretion requires a denial of the petition.

C. In the Light of the Unanimous Findings of Fact by the Courts Below that Respondent Had Made a Declaration of Value in Compliance With the Requirements of the Warsaw Convention, this Court Should Deny Certiorari.

Petitioner asserts that, assuming liability on its part under the Warsaw Convention, Orlove's recovery should be limited to 250 francs per kilogram. As a basis to support this argument, petitioner claims that Orlove made no declaration of value at the time of the delivery of his box. This contention, however, is directly contrary to the *findings of fact* made by the District Court and the Court of Appeals unanimously. That petitioner's argument is unworthy of consideration, is evident from the following language of the Court of Appeals at pp. 387-388:

> "In this situation the argument is bold. The obvious purpose of the Article [of the Convention] is to inform the carrier of the risk it assumes in providing carriage for a valuable shipment and to allow it to take the necessary steps to minimize that risk. Here PAL [petitioner] was given the necessary information in precisely the fashion it chose. Moreover, the plaintiff [Orlove] literally complied with the Article, for at the time he delivered the package to FTL [Flying Tiger Line] he had already declared its value and had impliedly agreed to an increased freight charge."

This Court's reluctance to review decisions of lower courts, turning solely on questions of fact found by the trial court and unanimously concurred in by the Court of Appeals, is clearly apparent from the following language in *Graver Mfg. Co.* v. *Linde Co.*, 336 U. S. 271, where the Court said (p. 275):

> "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, can-

not undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error [citing cases]."

Since the issue sought to be raised by petitioner is essentially factual, has been unanimously decided against it by the courts below and no obvious or exceptional error has been shown, this Court should refuse to grant certiorari.

CONCLUSION

It is evident from all of the foregoing, that petitioner's application for a writ of certiorari presents no constitutional, novel, special, fundamental or important questions of federal law nor establishes any conflict with federal court decisions or admonitions of this Court and should, therefore, be denied.

Respectfully submitted,

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